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SUPREME COURT
STATE OF WASHINGTON

2006 SEP 19 A 11:36

BY C. J. MERRITT

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

GAYLON THIEFAULT,

Appellant.

No. 77753-5

MOTION TO STRIKE NEW ISSUE ARGUED IN
DEFENDANT'S SUPPLEMENTAL BRIEF

I. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

To strike a new argument raised for the first time in the defendant's supplemental brief to the Supreme Court, to which the State has not had the opportunity to respond.

III. FACTS RELEVANT TO MOTION

The defendant was convicted after jury trial in 2001 on the charge of Attempted Second Degree Rape. His original sentence was overturned

on appeal in part because the trial court considered an out of state conviction to sentence the defendant under the two strikes law which had not been included in the statute at the time the defendant committed his offense. At re-sentencing in 2003 the defendant was sentenced under the three strikes law. He was represented by different counsel at the re-sentencing hearing.

On appeal the defendant argued his second counsel was ineffective for failing to challenge the comparability of out of state convictions. Alternatively, he argued the Court should review the Trial Court's comparability analysis. The Court of Appeals rejected the defendant's arguments, and upheld the sentence.

In his petition for review the defendant again the ineffective assistance of counsel issue and the adequacy of the Trial Court's comparability analysis. He argued that he was entitled to a jury trial on the issue of whether the out of state conviction was factually comparable to a Washington offense. The State filed a supplemental brief after review was accepted addressing the issues raised in the defendant's petition.

The defendant also filed a supplemental brief after review was accepted. For the first time the defendant argued that double jeopardy principles preclude the State from submitting any new documentation at a

re-sentencing hearing in order for the Trial Court to make a further factual comparability analysis. The State has not had an opportunity to respond to this argument.

IV. GROUNDS FOR RELIEF AND ARGUMENT

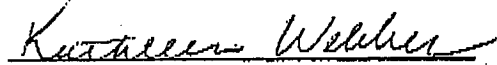
The defendant's new double jeopardy argument should be struck. This is a new argument which the State had not had the opportunity to respond to. It is contrary to current decisions of this Court. The Court has held that double jeopardy protections are not violated when a court remands a case for re-sentencing after determining the sentence was erroneously imposed in State v. Freitag, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995). Additionally, where the defendant has not objected to the use of out of state convictions in order to determine his sentence, and the appellate court later finds that the record is insufficient to sustain use of those convictions, the Court has remanded for an evidentiary hearing to allow the State to present additional documentation which would allow the Trial Court to complete the comparability analysis. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

The Court does not consider new issues raised for the first time in a reply brief. RAP 10.3(c). The reason that the Court will not consider new issues is because the respondent would not get an opportunity to address

those newly raised issues. Spokane v. White, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000), review denied, 143 Wn.2d 1011, 21 P.3d 291 (2001). The same principle applies here. Because supplemental briefs filed after review has been accepted are filed simultaneously, the State has no opportunity to respond to the issue raised by the defendant's new argument. Particularly here, where the defendant's argument is contrary to existing decisions of the court, the Court should refrain from considering the issue unless it has the benefit of full briefing and argument from the parties.


For the forgoing reasons, the State requests that the Court strike the defendant's new double jeopardy argument.

Respectfully submitted on September 19, 2006.


KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney
Attorney for Respondent

I certify under penalty of perjury under the laws of the State of Washington that the facts set out in part III above are true.

Signed at Everett, Washington on September 19, 2006.


KATHLEEN WEBBER, #16040

and faxed
On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office
this 19 day of Sept, 2006